Customs and International Trade Bar Association

November 23, 2004

Honorable James J. Jochum
Assistant Secretary of Commerce
Central Records Unit, Room 1870
14th Street & Constitution Avenue, N.W.
Washington, DC

Attention: Elizabeth Seastrum

Re: Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings: Comments Concerning the Notice of Proposed Rulemaking

Dear Mr. Secretary:

On behalf of the Customs and International Trade Bar Association (CITBA), please accept the enclosed comments for filing in the captioned inquiry. The bar association must coordinate comments, such as these, with its numerous committee members and its Board of Directors. Despite our efforts, we were unable to complete this process and edit the comments for filing before the November 22 deadline. As our comments are only one day late, there does not appear to be prejudice to any interested person. We therefore respectfully request that the Department consider these comments in the captioned rule-making proceeding.

Respectfully submitted,

James R. Cannon, Jr.
Chairman, International Trade Committee

Customs and International Trade Bar Association

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Assistant Secretary of Commerce
Central Records Unit, Room 1870
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Re: Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings: Comments Concerning the Notice of Proposed Rulemaking

Dear Mr. Secretary:

Enclosed please find the comments of the Customs and International Trade Bar Association (CITBA) concerning the captioned inquiry. The Customs and International Trade Bar Association was founded in 1926. Its members consist primarily of attorneys who concentrate in the field of Customs law, international trade law and related matters. Our active members are also members of the Bar of the U.S. Court of International Trade. CITBA members represent United States importers, exporters and domestic parties concerned with matters that involve the United States unfair trade laws, export laws, customs laws, and related laws and regulations of federal agencies concerned with international commerce. Our members regularly practice before the Import Administration in the context of antidumping and countervailing duty proceedings.

CITBA here addresses the proposed regulation[1] only as it would apply to certifications by our members—attorneys. At the outset, CITBA commends the efforts of the Department to address the submission of false data, generally, and specifically as outlined in the January *Notice of Inquiry*.[2] Nevertheless, a few of the proposed changes merit further consideration before a final rule is adopted.

First, the proposed rule adds a new requirement that an attorney certify based upon "an inquiry reasonable under the circumstances." Commerce briefly describes the type of inquiry that should be made by an attorney with respect to information that is being certified:

> The Department would expect that attorneys perform due diligence of factual submissions in AD/CVD proceedings in the same manner that they would perform due diligence on any other factual submission to which they are certifying as to its completeness and accuracy.[3]

The scope of a reasonable inquiry is unclear from the proposed regulations and comments. In trade cases, attorneys for petitioners and respondents may or may not actually visit the business offices of their clients (outside of verification) or have physical access to original accounting records, such as the general ledger. On the other hand, attorneys do often have access to questionnaire responses and other data submitted to the International Trade

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[1] Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings—Notice of Proposed Rulemaking, 69 Fed. Reg. 56,738 (September 22, 2004).

[2] Certification and Submission of False Statements to Import Administration During Antidumping and Countervailing Duty Proceedings—Notice of Inquiry, 69 Fed. Reg. 3562 (January 26, 2004) (hereinafter "Notice of Inquiry").

Commission. It is unclear from the proposed rule and comment whether Commerce contemplates that attorneys would "audit" their clients' submissions, compare submissions made to different agencies, or merely ask questions concerning the sources relied upon to respond to questionnaires.

Moreover, the reference in the comments to "due diligence" might suggest a degree of thoroughness applied in the context of corporate transactions or the preparation of financial statements. In such cases, independent auditors or investigators may be employed, interviews conducted or material statements verified through other means. In the context of sales and cost data that is the grist for trade cases, there is not any precedent or common understanding as to what constitutes "due diligence" with respect to submissions that may be prepared by clients or consultants.

Rather than referring to "due diligence" or a "reasonable inquiry," therefore, the certification might instead achieve the intended purpose by stating that the attorney did not "consciously disregard" other facts and information indicating that a particular submission included false statements or omitted material information. That is, the certification might be more instructive by indicating that Commerce only expects attorneys to review information that is provided by their clients in a particular proceeding and not to search out potentially conflicting information from other sources.

Second, the proposed regulations establish a "continuing" obligation, at least for the duration of a given segment of a proceeding, to inform Commerce in writing of any "material

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[3] 69 Fed. Reg. at 56,739.

misrepresentation or omission of fact" in any prior submission.[4] There are at least two potential problems raised by this portion of the certification. Attorneys have an obligation to protect confidences of their clients. ABA Model Rules of Professional Conduct, Rule 1.6, states that attorneys "shall not reveal information relating to the representation of a client unless the client gives informed consent," or unless other circumstances are present that are not relevant here. The proposed regulation, which would require attorneys to inform Commerce upon discovering false information had been submitted, conflicts with the duty created by Rule 1.6.

Of course, attorneys also have professional obligations to the Department. For example, under Rule 3.3 the attorney may not permit a client to submit false information or otherwise participate in a false claim to a tribunal. When the duty of candor to the tribunal (Rule 3.3) conflicts with the duty to the client to maintain client confidences (Rule 1.6), the rules of professional conduct permit the attorney to withdraw from the representation.[5] The intention of the rules is that the attorney will attempt to persuade the client to correct the falsehood but will not disclose that information against the client's wishes.

The proposed Commerce regulation, however, does not provide any alternatives for an attorney faced with a demand by the client to protect its confidences. Under the proposed rule, the attorney cannot withdraw or refuse to certify future submissions; the certification states that the attorney "must notify Import Administration, in writing," if the attorney learns that a prior

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[4] 69 Fed. Reg. at 56,741.

[5] Once an attorney learns that information previously submitted was false, other ethics rules, such as Rules 1.2 and 1.16, may require that the lawyer withdraw from further representation.

submission included false information or a material omission.[6] Compliance with this requirement will therefore create a potential conflict with Rule 1.6. Although such situations should be rare, the regulation should be revised or clarified in comments accompanying the final rule.

Another issue raised by this provision is the limitation obligating submitters and attorneys to correct the record only with respect to a single segment of a proceeding. 69 Fed. Reg. at 56,741. The proposal suggests that there is a statute of limitations with respect to submissions of false information.[7] The rules of professional ethics, however, do not provide statutes of limitation with respect to the duty of candor to the tribunal (Rule 3.3). If the certification is to include any "continuing" obligation to disclose newly-discovered false statements, that obligation should not be limited to particular segments.

Finally, the proposed regulations reference "criminal sanctions" and 18 U.S.C. § 1001, but do not also reference rules of professional conduct that are applied by virtually every state bar association. As noted above, Rule 3.3 of the ABA Model Rules establishes a duty of candor to the tribunal. Rule 4.1 similarly provides that an attorney shall not make false statements to third persons. Certification of false statements would therefore violate the rules of professional conduct, apart from any criminal or other violation of federal law. Given the importance of the

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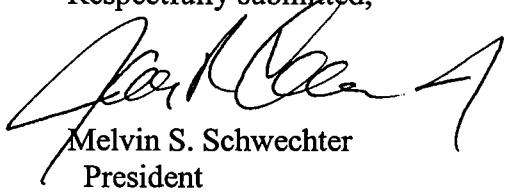
[6] 69 Fed. Reg. at 56,741.

[7] It may be noted that information submitted in one segment of a proceeding, for example a particular administrative review, can be re-submitted in later segments by any party. Thus, if an attorney were to learn after the first segment that the information was false, query does the proposed regulation excuse the attorney from correcting the submission?

rules of professional conduct, and the role of state bar associations to enforce these rules, the certification should not only reference potential criminal sanctions, but might also usefully indicate that false statements will be referred to the appropriate bar association.

Respectfully submitted,



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